**UNITED STATES DISTRICT COURT**
**DISTRICT OF MAINE**

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| **KATE LIBBY,** | ) | |
| | ) | |
| **Plaintiff** | ) | |
| | ) | |
| **v.** | ) | **Civil No. 97-139-P-H** |
| | ) | |
| **DANA HEACOCK and** | ) | |
| **SAL SCAGLIONE, d/b/a ABACUS** | ) | |
| **PUBLISHING,** | ) | |
| | ) | |
| **Defendants** | ) | |

***RECOMMENDED DECISION***

The plaintiff, Kate Libby, brought this action for damages against the defendants, Dana Heacock and Sal Scaglione, d/b/a Abacus Publishing (hereinafter "the defendants" or "Heacock and Scaglione"), alleging, *inter alia*, breach of contract as a result of an eleven-year course of business dealings between the parties. The defendants have raised a number of counter-claims. The parties have filed motions for summary judgments. After careful consideration of the motions, I recommend that the defendants' motion be denied except as to Count V of the plaintiff's complaint, and that the plaintiff's motion be denied.

## I. Summary Judgment

A summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is genuine, for these purposes, if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A material fact is one which has the 'potential to affect

the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record in the light most favorable to the nonmovant. *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995).

## II. Background

Considering the parties' respective motions, the undisputed facts of the case are set forth first, then, when appropriate, the parties' respective versions of the facts shall be examined.

From 1986 through 1996, the defendants purchased pursuant to an agreement between the parties paintings from Libby for use in a calendar marketed by their business, Abacus Publishing. During this period, Libby received approximately $500,000 in compensation from the defendants. Although Libby contends that she still is owed some $400,000 by Heacock and Scaglione, the defendants claim that Libby ceased providing them with artwork for use in their business several years ago, and that Libby has begun working for another publisher to produce a similar calendar in violation of the parties' agreement.

***Defendants' Statement of Material Facts***

The defendants offer the following facts in support of their motion. On April 14, 1986, Heacock and Scaglione signed an agreement with Libby pursuant to which she would provide artwork to them for use in a 1987 calendar in return for royalty payments to Libby of 10% of gross wholesale revenues, with a minimum guaranteed royalty of $10,000. When the parties agreed to continue the working arrangement for a second calendar, a new business arrangement was entered into by them. According to the defendants, however, when they arrived at Libby's residence in February 1987 to pick up the artwork for the new calendar, Libby refused to give

them the paintings, allowing instead her then boyfriend, Doug Walker, to attempt to negotiate a new business contract between the parties. Walker is said to have insisted on more money for Libby, telling Heacock and Scaglione "you either sign it or you get no artwork, period." The new contract proposal would have required the defendants to pay Libby 25% of gross revenues as royalties, with a minimum guarantee of $48,000. The proposal also called for the defendants to pay Libby one-third of "net pretax profits" to the extent that such profits exceed the royalty amounts paid to Libby. The contract also would have required the defendants to make available to Libby, on a quarterly basis, all records kept by their businesses, Abacus Publishing and Abacus Gallery, necessary to determine pretax net profits, including a list of specific expense items. Heacock and Scaglione refused to sign a new contract that day, and left Libby's residence without the paintings.

Although reluctant to enter into the new agreement, Heacock and Scaglione eventually agreed to sign it, stating that they felt they had no other choice. They owed their printer for thousands of dollars of paper stock they had ordered in anticipation of a new calendar, and had a limited amount of time to deliver the art to the printer. The two felt they had no time to find another artist with whom to work in producing a calendar for 1988, and generally felt under duress. Thus, in March of 1987, Heacock and Scaglione agreed to pay Libby royalties equal to 25% of gross wholesale revenues, with a minimum guaranteed royalty of $48,000. The two claim, however, that prior to and after signing the new contract, they made known to Walker that they objected to the provision requiring them to pay Libby one-third of the net pretax profits in excess of royalties.

For the next four years, the parties worked together as business partners, and Libby

produced paintings for four more calendars in 1989, 1990, 1991, and 1992. According to Libby's estimate, she received over $200,000 during this period. According to the defendants, Libby never asked for or received one-third of the net pretax profits that exceeded the royalties. Since 1987, Heacock and Scaglione have paid Libby compensation equal to 25% of the gross wholesale revenues from the sale of the calendars. The guaranteed minimum royalty of $48,000 was paid in monthly installments of $4,000. Ultimately, in the summer of 1991, Doug Walker approached the defendants about paying Libby one-third of the pretax net profits that exceeded the royalties. Walker apparently had been in contact with another publisher, David Betses, who was interested in publishing a calendar using Libby's paintings. Walker informed the two that unless they paid Libby the net pretax profits, she would cease supplying paintings to them. The defendants worked with their accountant and determined that the business had no net pretax profits for the years 1989 and 1990. Scaglione told the accountant to prepare some schedules that would, however, produce some payment to Libby. In July 1991, the defendants paid Libby $6,034 as a result of Walker's insistence that Libby be paid more money.

In the fall of 1991, Libby ended her relationship with Walker and continued to work with the defendants under the previous arrangement for the next five years. Libby continued to produce paintings for the defendants to use in calendars from 1993-1997, and she continued to receive 25% of gross wholesale revenues, with a guaranteed minimum royalty of $48,000. Libby received payments approximating $250,000 during this five-year period. According to Heacock and Scaglione, at no time after their 1991 meeting with Walker did Libby ever request payments representing a portion of the net pretax profits.

In 1995, the parties agreed to produce t-shirts and prints using Libby's paintings from the calendars produced by Abacus Publishing. Although the parties discussed royalty payments to Libby in the range of 5-15% of the gross profits, Libby is said to have left it to the defendants' discretion to set an exact figure. The defendants calculated the royalties to Libby at 5% for the t-shirts, and at 10% for sales of the prints. Libby signed many prints prior to their sale, and never asked the defendants to cease selling the products.

The defendants state that throughout their business relationship, Libby often failed to timely deliver paintings to them in contravention of their business arrangement. In February of 1996, the defendants received a letter from Libby's father-in-law, Tom Cornell, stating that he would from then on be serving as an intermediary between the parties, and that all direct communications by the defendants with Libby should cease. As a result of the late delivery of some paintings by Libby, as well as the disruption of direct communications with her, Heacock and Scaglione were forced to delay the printing and production of the calendar that year. In light of the new working arrangement, the defendants determined that relations had deteriorated to the point that business between the parties was unworkable. On May 1, 1996, Heacock and Scaglione informed Libby that their business relationship was terminated.

***Plaintiff's Statement of Material Facts***

The plaintiff offers the following relevant facts in support of her motion for a summary judgment. On April 14, 1986, Heacock and Scaglione entered into a written contract, prepared by Heacock, with Libby whereby Libby would produce and deliver paintings to the defendants for use in producing "The Kate Libby Calendar" for sale by Abacus Publishing. The agreement called for Libby to receive royalties based on wholesale calendar sales, with a minimum

payment. The contract covered a two-year term and placed no restrictions on Libby's right to compete upon completion or termination of the contract.

On March 6, 1987, the parties signed a second written agreement entitled "Contract" for the same business purpose as the previous agreement. The new agreement provided that Libby would receive a $48,000 minimum fee, a royalty of 25% on calendar sales over and above $48,000, and one-third of the net pretax profits of Abacus Publishing. Libby's share of the net pretax profits was to be determined by subtracting from the company's income all of its publishing expenses, as well as all royalties paid her. Libby was to receive one-third of the net result on July 15 of each year. The contract further provided that Abacus Publishing was to take "extreme care" in maintaining accurate and detailed expense records in order to permit a determination and verification of the net pretax profits of the company. The contract also required that the artwork provided by Libby to the company could not, without her written consent, be used for any purpose other than publication of the calendar. The contract also provided that Abacus Publishing would maintain and make available each year to Libby wholesale customer lists, and that such lists would be the "joint property" of the defendants and Libby. Finally, the contract provided that the parties agreed to be "bound by its terms," and that any amendments thereto would need to be in writing.

Between 1987 and 1996, Abacus Publishing produced a poster calendar featuring Libby's artwork. No other written agreements governing their business relationship were entered into by the parties during this period. Although Heacock and Scaglione claim that the parties operated under a series of oral agreements from November 1991 through May 1, 1996, and not pursuant to the written contract, there are no writings that evidence these supposed oral agreements. On May

1, 1996, the defendants notified Libby that they were terminating the "existing contract." In October 1996, Libby entered into a written contract with Willard Publishing for production of a 1998 calendar featuring her artwork. In addition to the calendars produced by Abacus Publishing and Willard Publishing, there are between five and nine other poster calendars on the market using a portfolio format with 11" x 14" posters of reproduced paintings.

By her complaint, Libby seeks damages and equitable relief for breach of contract; unfair competition in violation of the Lanham Act, 15 U.S.C. § 1125(a) (1998); conversion; intentional infliction of emotional distress; unauthorized alteration and modification of artwork in violation of Maine statutory law, 27 M.R.S.A. § 303 (1988); and intentional interference with contractual relations and prospective economic benefit. Libby also seeks an order requiring the defendants to account for all sales, expenses, and profits related to any merchandise depicting her artwork. Claiming that they have suffered a loss of income and business, the defendants have brought a variety of counterclaims against Libby, including breach of contract; trademark violation; deceptive trade practices; unfair competition; tortious interference; unjust enrichment; and emotional distress.

## III. Discussion

### *Defendants' Motion for Summary Judgment*

The defendants have moved for a summary judgment on Libby's complaint based on a variety of contentions. Heacock and Scaglione contend that much of Libby's complaint is barred by the statute of limitations; that she has failed to produce credible evidence of damages; that the 1987 contract is voidable because the defendants were forced to sign it under duress; and that Libby has waived or abandoned all claims under the 1987 contract. In addition, the defendants

contend that Libby's unfair competition, conversion, and state law claims must fail as a matter of law because the evidence shows that Libby specifically authorized their use of her artwork. Heacock and Scaglione also aver that Libby's intentional infliction of emotional distress claim must fail because she has failed to adduce sufficient evidence in support thereof. Finally, the defendants contend that Libby's prayer for an order requiring an accounting of the defendants' business records should be dismissed as moot.

*A. Statute of limitations*

Heacock and Scaglione initially contend that many of Libby's claims are barred by Maine's six-year statute of limitations for civil actions. Libby responds that the governing statute actually imposes a twenty-year period of limitations for her action, and, thus, that her claims may proceed.

Libby's complaint seeks damages and other relief for claims related to an eleven-year period of business dealings between the parties from 1986-1997. Libby's complaint was filed on April 28, 1997. In Maine, "[a]ll civil actions shall be commenced within six years after the cause of action accrues and not afterwards." 14 M.R.S.A. § 752 (1980). It is well settled that this limitation period applies to claims of breach of contract. *Palmero v. Aetna Cas. & Sur. Co.*, 606 A.2d 797, 798 (Me. 1992); *Kasu Corp. v. Blake, Hall & Sprague, Inc.*, 582 A.2d 978, 979 (Me. 1990). Libby contends, however, that section 752 does not govern this case but, instead, that section 751 does. Section 751 imposes a twenty-year period of limitations for "personal actions on contract . . . under seal . . . ." 14 M.R.S.A. § 751 (1980). Libby contends that because the contract at issue in this case has a notary seal accompanying the parties' signatures, her claims are governed by the longer statute of limitations. This argument is unpersuasive, however.

I do not conclude that, for purposes of the law, Libby and the defendants signed the contract at issue "under seal." Simply because the document is notarized does not, without more, make it subject to the twenty-year limitations period set forth in section 751. *See, e.g., Chapman v. Wight*, 79 Me. 595, 596 (1887) (contract barred by six-year period of limitations even though signed in presence of attesting witness). The statute notably distinguishes between documents signed "under seal" and those signed with an "attesting witness" present. In Maine, a signature "under seal" appears to require either the seal of the person signing it or it must recite that the "instrument is sealed by or bears the seal of the person signing the same . . . ." 1 M.R.S.A. § 72 (26-B) (1989). A notarized signature appears to be different from a signature under seal which, at common law, was a substitute for consideration. *See* 68 Am. Jur. 2d *Seals* § 11 (1973). The contract at issue in the case at bar does not bear a party's seal or recite the word "seal." The document thus does not appear to constitute a document "under seal" as contemplated by section 751.

Libby's alternative argument on this point is that the defendants waived any defense based on the statute of limitations by pleading in their counterclaim claims for breach of contract for those same periods for which they seek to bar Libby's claims. This contention also is unpersuasive, however. The defendants' pleadings do not appear to have waived any defense based on the statute of limitations. It is not fatal to their defense that their counterclaims appear in the same pleading that raises a defense based on the six-year limitations period. Indeed, the Federal Rules of Civil Procedure expressly allow a party to plead conflicting theories in the alternative. Fed. R. Civ. P. 8(e) ("A party may . . . state as many separate claims or defenses as the party has regardless of consistency . . . .").

Accordingly, I recommend that those portions of Libby's various counts (in particular Counts I, II, IV, V, and VII) that allege breach of contract or otherwise relate to any conduct on the part of the defendants that occurred before April 28, 1991, six years prior to the filing of Libby's complaint, should be barred from consideration in this matter.

*B. Breach of contract (Count I)*

The defendants further contend that the remaining portions of Libby's breach of contract claim should be dismissed because no additional payments are owed Libby under the terms of the 1987 contract; because Libby procured the defendants' signatures on the contract by means of duress; and because Libby has waived or abandoned all claims under the contract.

Heacock and Scaglione's first contention with respect to this count is that because Libby has produced no credible evidence of damages, the claim should be dismissed. In particular, the defendants contend that Libby has produced no evidence that they ever realized any net pretax profits in excess of royalties. Although it is true that a court may dismiss a claim for breach of contract when there is insufficient evidence of damages, *Lovell v. One Bancorp*, 818 F. Supp. 412, 424 (D. Me. 1993), *aff'd*, 14 F.3d 44 (1st Cir.), *cert. denied*, 512 U.S. 1235 (1994), Libby has proffered calculations by her expert, David Smith, to raise the issue of damages. Although the defendants contend that these figures are too unreliable to be given any credence, that is a matter for the factfinder's determination. Accordingly, I recommend that a summary judgment be denied on this ground.

The defendants next argue that they were under duress when, under pressure from Libby's then-boyfriend, Doug Walker, they signed the 1987 contract. Heacock and Scaglione contend that Walker forced them to sign the contract by holding Libby's artwork for the 1988 calendar

hostage. Citing the Restatement (Second) of Contracts § 175(1) (1979), and a variety of cases, the defendants contend that the contract is voidable. The Restatement (Second) of Contracts § 175(1) provides as follows:

> If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

I conclude that the defendants are not entitled to a summary judgment on the contract count based on this argument. To begin with, it is less than clear whether Maine law even recognizes the concept of economic duress as a ground for defeating a contract. *See City of Portland v. Gemini Concerts, Inc*., 481 A.2d 180, 182-183 (Me. 1984) (even assuming that doctrine of business compulsion is recognized in Maine, theory unsupportable because defendant signed contract under time pressures of its own creation). Even if this were a viable legal argument, the defendants have not adduced sufficient evidence to support a finding as a matter of law that coercion even occurred in this case. There is evidence that Walker told Heacock and Scaglione: "You either sign it or you get no artwork, period," but there also is evidence from Libby that the two went to their home in Florida and mulled over the proposed contract, and negotiated via telephone with Libby over an extended period of time prior to eventually entering into the agreement. Libby claims that she never was told by the defendants that they felt coerced into signing the new agreement, and the defendants do not dispute this. There is insufficient evidence to support a finding as a matter of law that the defendants felt they had no alternative but to sign the new contract.

Finally, with respect to this count, the defendants contend that they are entitled to a summary judgment because Libby waived or abandoned all claims under the contract because

she disclaimed it in the past and because she never has, until now, sought to enforce its provisions legally. "Waiver is the voluntary and knowing relinquishment of a right, . . . and may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon." *Department of Human Servs. v. Brennick*, 597 A.2d 933, 935 (Me. 1991) (internal quotations and citations omitted).

In support of this argument, Heacock and Scaglione submit evidence that Libby believed the contract was Walker's idea, that she did not participate in any negotiations concerning it, and that she does not even now understand key provisions of the document. They also point out that Libby only once accepted a payment for net pretax profits, and that she generally has abided by the business arrangement that existed prior to the "new" contract.

I cannot conclude that Libby as a matter of law has waived any rights she had under the contract based on the above evidence submitted by the defendants. Whether a party has waived a contractual right generally is a question of fact. *Williams v. Ubaldo*, 670 A.2d 913, 916 (Me. 1996). There appear to be controverted facts with respect to this issue, including Libby's actual intent, that cannot be resolved by a summary judgment.

*C. Unfair competition (Count II)*

The defendants contend that they are entitled to a summary judgment on Count II of Libby's complaint, in which she alleges unauthorized use of her artwork by the defendants to produce t-shirts and prints. The defendants contend that Libby's own testimony reveals that she in fact authorized the use of her paintings for such business purposes.

Libby claims that the defendants violated that portion of the contract prohibiting them from using her paintings without her written permission for any other purpose aside from the production of calendars. She claims that the defendants have done just that, however, contrary to her wishes. Such unauthorized advertising and selling of her artwork, coupled with the use of a false signature, constitutes, she maintains, a violation of the Lanham Act, which, among other things, prohibits a party from using in commerce another party's artwork by use of a false designation of origin. 15 U.S.C. § 1125(a). Because Libby denies that she did, in fact, authorize such uses of her artwork, however, a genuine issue exists with respect to the claim, and a summary judgment on this count is inappropriate. In light of the parties differing versions as to whether Libby herself authorized use of her artwork for such business purposes, a key element of the claim, a summary judgment on this count should be denied.

*D. Conversion (Counts III and IV)*

Similar to her allegations contained in Count II, Libby claims in Count III of her complaint that the defendants converted her paintings through their unauthorized use and sale as t-shirts and prints. In Count IV, she alleges that Heacock and Scaglione converted certain customer lists by failing to provide copies of them to her as required by the contract. The defendants contend that they are entitled to a summary judgment on this Count because Libby gave them the right to possess the artwork through her express authorization, and because Libby received the only customer lists available. In the alternative, Heacock and Scaglione contend that Libby has failed to incur any damages as a result of the alleged conversion.

In order to make out a claim for conversion, one must show: (1) that there is a property interest by the person claiming the property was converted; (2) that the person had a right to

possession at the time of the alleged conversion; and (3) that the party with the right to possession made a demand for a return, which was refused by the holder. *Leighton v. Fleet Bank of Maine*, 634 A.2d 453, 457 (Me. 1993) (citations omitted).

Although it is true that "[t]here can be no conversion of property by one who has a right to the property," *id*. at 457 (citation omitted), there is, as noted above, a genuine issue as to whether the defendants did, indeed, possess a right to Libby's artwork at the time of its allegedly improper use. With respect to the customer lists, Libby denies having received updates of this list beyond July of 1991, even though the contract requires that an annual list be placed in escrow. Libby alleges that the defendants have failed to maintain and furnish a current list to her, or to provide the list to her, as required, in the event of a termination of the contract. Finally, she maintains that the failure by the defendants to provide her with a current list deprived her of a valuable business asset, depriving her of a stronger negotiating position with respect to her current publisher. In light of these disputed facts, a summary judgment should be denied on these Counts, as well.

*E. Intentional infliction of emotional distress (Count V)*

The defendants contend that because Libby has failed to produce evidence of extreme and outrageous conduct by them, or that she suffers from any severe emotional distress, they are entitled to a summary judgment on her claim for intentional infliction of emotional distress.

To make out a claim for intentional infliction of emotional distress, a plaintiff must show that: (1) the defendants intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from the conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded

as atrocious and utterly intolerable in a civilized community; (3) the actions of the defendants caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was "severe" so that no reasonable person could be expected to endure it. *Orono Karate v. Fred Villari Studio of Self Defense*, 776 F. Supp. 47, 51 (D. N.H. 1991) (internal quotations and citations omitted).

Libby contends that she has offered sufficient evidence to support a finding in her favor on this claim, including the defendants' unauthorized signing of her name to prints; their appropriation of her artwork and the joint customer lists; and their false statements to potential customers as to her physical condition. Contrary to her contention, however, I cannot conclude that Libby has alleged or adduced sufficient evidence that any conduct in this matter "could possibly be considered so extreme and outrageous as to exceed the bounds of decency or that could be construed as atrocious." *Orono Karate*, 776 F. Supp. at 51. Nor has Libby alleged or adduced any evidence to support a genuine issue that her emotional distress was so severe that no reasonable person could be expected to endure it. *Id.* Accordingly, I recommend that a summary judgment in the defendants' favor be entered on this count.[1]

*F. Maine statutory violation (Count VI)*

Heacock and Scaglione contend that a summary judgment in their favor should be entered on Count VI, as well, in which Libby alleges a violation of 27 M.R.S.A. § 303 (1988), which

[1] It is unclear whether the plaintiff makes a claim for intentional infliction of emotional distress as part of her breach of contract claim or, instead, as a separate tort. If the former course of action is intended, however, it is clear that Maine law does not look favorably on the availability of recovery for emotional distress as part of a contract action. *See Orono Karate v. Fred Villari Studio of Self Defense*, 776 F. Supp. 47, 52 & n.7 (D. N.H. 1991) (Maine courts have recognized only very narrow exceptions to the general rule that precludes damages for emotional or mental distress for breach of contract).

prohibits, among other things, the unauthorized publication, modification, and reproduction of an artist's work. The defendants contend that Libby authorized their use of her art in selling prints and t-shirts, and that the statute is inapplicable to work that is prepared for trade use. They also maintain that Libby has failed to produce, as required by section 303(2) of the statute, any evidence that damage to her reputation was likely to result from the display of her work.

Because Libby denies that she authorized the use of her artwork by the defendants for these purposes, there is a dispute regarding authorization, a key element to the statutory claim. In her statement of material facts in opposition to the defendants' motion, Libby states that, although open to the idea of selling prints and t-shirts based on her artwork, the arrangement was contingent on the parties agreeing on a new contract and to a compensation figure. Because, she claims, the parties never, in fact, reached agreement on such an arrangement, however, she never authorized the use of her artwork for these purposes. Thus, a summary judgment in the defendants' favor is inappropriate on this claim.

*G. Intentional interference with contractual relations (Count VII)*

The defendants also move for a summary judgment on Count VII of Libby's complaint, in which she claims intentional interference by the defendants with contractual relations. Heacock and Scaglione contend that this claim should be dismissed because Libby has failed to produce any evidence of fraud, intimidation, or damages in support thereof. Although, as the defendants note, it is true that an essential element of a claim for interference with contractual relations is proof of fraud or intimidation, *Pombriant v. Blue Cross/Blue Shield of Maine,* 562 A.2d 656, 659 (Me. 1989), I conclude that Libby has generated sufficient evidence to permit a factfinder to conclude that fraud or intimidation occurred in this case.

Libby has, for example, testified that the defendants or their agents stated or implied to potential customers on two separate occasions that she was ill and no longer creating a calendar. Libby also claims that the defendants willfully deprived her of the joint customer lists to make it difficult for her to earn a living. Libby also alleges in her complaint that the defendants threatened her current publisher, David Betses, with legal action if he produced a calendar featuring Libby's artwork. The defendants have not established through their own evidence that no issue of fact exists with respect to this claim. I recommend that a summary judgment on this claim be denied.

*H. Accounting (Count VIII)*

Finally, the defendants contend that Libby's prayer for an accounting of many years' worth of their financial and business records should be dismissed as moot because, in light of the examination of them by the plaintiff's and the defendants' own experts, there is no useful purpose for an accounting now. Libby did not directly respond to the defendants' motion on this count.

The defendants' prayer really is for equitable relief. Accordingly, in view of the fact that neither party has generated sufficient evidence to permit a finding, as a matter of law, that an accounting must or must not be ordered, I recommend that the defendants' motion on this claim be denied.

Accordingly, with respect to the defendants' motion for a summary judgment on all counts of the plaintiff's complaint, I recommend that it be denied on Counts I, II, III, IV, VI, VII, and VIII, but that a summary judgment be granted on Count V. I further recommend that those portions of Libby's various counts (in particular Counts I, II, IV, V, and VII) that allege breach of contract or otherwise relate to any conduct on the part of the defendants that occurred before

April 28, 1991, six years prior to the filing of Libby's complaint, be barred from consideration in this matter.

***Plaintiff's Motion for Summary Judgment***

Libby has filed a cross-motion for a summary judgment on all counts of the defendants' counterclaims. She contends that she is entitled to a judgment as a matter of law with respect to the defendants' claims for breach of contract; unfair competition and trademark infringement under the Lanham Act; their state law claims for trademark infringement, deceptive trade practices, and unfair competition; as well as their tortious interference; unjust enrichment; negligence; intentional infliction of emotional distress; and punitive damages claims. As discussed below, the plaintiff's failure to adequately support her motion with argument or evidence with respect to various claims makes it difficult, if not impossible, for the Court to grant the motion.

*A. Breach of contract (Count I)*

In her motion, Libby appears to base her opposition to the defendants' breach of contract claim on the argument that the written contract entered into by the parties on March 6, 1987, controls, and that any claim by the defendants that a series of oral agreements governed their business relationship with Libby is untenable. Without more, however, there simply is no basis on which to grant the plaintiff a summary judgment against the defendants on this claim. The plaintiff fails to address with any evidence the gravamen of the defendants' claim, that is, that they incurred losses as a result of Libby's failure to deliver her paintings in a timely manner over a period of time. Nor has Libby adequately responded to Heacock and Scaglione's contention that she breached her promise not to compete against Abacus Publishing.

Libby's emphasis on how the written contract governs the parties' claims in this case does nothing to show that, as a matter of law, the defendants cannot prevail at trial on their breach of contract claim. The defendants have generated evidence that Libby agreed she had a contractual obligation, per the 1987 written agreement, to deliver a certain number of paintings by a firm deadline each year. Heacock and Scaglione also have submitted evidence supporting their claim that, as a result of Libby's delays, they have suffered lost sales. The defendants' claim with respect to the non-competition clause of the contract is supported by evidence that, after ending her business relationship with the defendants in 1996, Libby signed a contract with David Betses to publish a competing poster calendar. The defendants further claim that Libby improperly used their customer lists to solicit sales for her new calendar, and that confusion of the calendars resulted. Thus, even if the 1987 written contract is found to govern the parties' relations, there remain genuine issues as to whether Libby breached it by her actions. Accordingly, the plaintiff has failed to show that, as a matter of law, Heacock and Scaglione cannot prevail on Count I of their complaint; I thus recommend that Libby's motion be denied with respect to this claim.

*B. Lanham Act and state trademark statute (Counts II and III)*

In Counts II and III of their complaint, the defendants state claims for unfair competition under the federal and state trademark statutes, 15 U.S.C. § 1125(a); 10 M.R.S.A. § 1529(2) (1997). Libby moves for a summary judgment on these counts, contending that the defendants' allegation of trade dress infringement must fail as a matter of law because they cannot show that the format and appearance of the Abacus Calendar is "inherently distinctive."

A "trade dress," one of the types of trademarks protected by the federal and state statutes at issue, is protected under the Lanham Act when it is distinctive and the similarity of a party's

trade dress is likely to cause confusion on the part of the public as to the source or origin of the goods or products. *Two Pesos v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992). This "likelihood of confusion" inquiry typically is a question of fact. *Aktiebolaget Electrolux v. Armatron Int'l*, 999 F.2d 1, 4 (1st Cir. 1993).

The defendants contend that since 1986 they have used the same distinctive trade dress for their calendar; that Libby has adopted a trade dress for her new calendar that is confusingly similar; and that her calendar is, in many ways, indistinguishable from the Abacus Calendar. They further point out that Libby's new publisher, David Betses, concedes that he and Libby already have sold some calendars from the Abacus Publishing customer list. Contrary to Libby's contention, I cannot find, as a matter of law, that the trade dress of the Abacus Calendar is not "inherently distinctive," and, therefore, is not protected under the trademark statutes. Again, this is a question of fact for the factfinder's determination. *Equine Technologies v. Equitechnology, Inc.*, 68 F.3d 542, 544 (1st Cir. 1995). Because there remains a genuine issue as to whether the trade dress at issue is inherently distinctive, a summary judgment is inappropriate on this count. *Maple Grove v. Euro-Can*, 974 F. Supp. 85, 97 (D. Mass. 1997) (whether trade dress "inherently distinctive" a question of fact precluding summary judgment).

*C. Maine's Uniform Deceptive Trade Practices Act and unfair competition (Counts IV and V)*

Libby moves for summary judgments on Counts IV and V of the defendants' complaint, in which they claim violations of Maine's Uniform Deceptive Trade Practices Act, 10 M.R.S.A. § 1211 - 1216 (1997), and unfair competition under the common law. As the defendants note, however, the plaintiff largely fails to address these claims in her motion, and summary judgments

therefore are inappropriate.

In her motion, the plaintiff has raised in a cursory manner, not sufficiently supported with evidence or argument, her opposition to these two counts of the defendants' counterclaim. In light of such shortcomings, I recommend that the Court deny Libby's motion with respect to these two counts.

*D. Tortious interference with business relationship (Count VI)*

The same fatal flaw applies to this count, as well. Although Libby generally has moved for a summary judgment on the defendants' Count VI, in which they allege tortious interference with a business relationship, she does not support her motion with any specific objections, evidence, or argument. It is not for the Court to probe the record for supporting evidence or argument, or to make a party's argument on their behalf. Thus, I recommend that the Court deny Libby's motion with respect to this count, as well.

*E. Unjust enrichment (Count VII)*

Libby likewise has failed to support adequately her motion for a summary judgment on Heacock and Scaglione's claim for unjust enrichment. Accordingly, I recommend that the Court deny a summary judgment in the plaintiff's favor on Count VII of the defendants' counterclaim, as well.

*F. Intentional and negligent inflictions of emotional distress (Counts VIII and IX)*

Finally, I recommend that the Court deny Libby's motion for summary judgments on Counts VIII and IX of the defendants' counterclaim, in which they seek damages for negligent and intentional inflictions of emotional distress. Libby simply has failed to support her motion with respect to these claims with any evidence, argument, or references to the record.

Accordingly, I recommend that the Court deny the plaintiff's motion for a summary judgment on all counts of the defendants' counterclaim.

## IV. Conclusion

For the foregoing reasons, I recommend that the Court **DENY** the defendants' motion for a summary judgment on all counts of the plaintiff's complaint, except as to Count V, which, in my view, is worthy of entry of a summary judgment in the defendants' favor. I also recommend that those portions of the plaintiff's counts that allege breach of contract or otherwise relate to any conduct on the part of the defendants that occurred before April 28, 1991, six years prior to the filing of Libby's complaint, should be barred from consideration in this matter. I further recommend that the Court **DENY** the plaintiff's motion for a summary judgment on all counts of the defendants' counterclaim.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu
United States Magistrate Judge

Dated this 6th day of February, 1998.